

retroactive punishment is in direct contrast to Liberty Media's claim that analogy to the FTCA statute demonstrates that the Commission is limited to ordering prospective relief for violations of the program access rules.

D. The Determination of Damages Will Not Delay the Resolution of Program Access Complaints If the Damages and Liability Portions of the Proceeding are Bifurcated

Cable incumbents claim that the awarding of damages would complicate and delay the resolution of program access complaint proceedings, contrary to the goals of Congress.^{56/} Ameritech reiterates its view that the resolution of damages determinations should be handled in a manner similar to the procedures recently encouraged in the *Common Carrier Report and Order*. By deferring the resolution of damages issues until after a determination of liability in the manner proposed by Ameritech, the Commission could immediately order prospective relief to injured competitors upon a finding of liability, bringing the benefits of competition to the marketplace to the ultimate benefit of consumers.^{57/}

E. The Award of Damages for Program Access Violations Will Not Lead to Frivolous Complaints

Several cable industry commenters claim that the availability of damages will promote frivolous and excessive complaints by competitive MVPDs. This argument is both illogical and ignores the fact that the Commission's current rules provide for punishment for filing frivolous

^{56/} Comments of NCTA at 10; Comments of HBO at 20.

^{57/} The Commission should, however, assess forfeiture penalties immediately upon a finding of liability. Since forfeiture amounts are generally predetermined, it is not necessary to determine their amount via a separate proceeding.

complaints.^{58/} As an initial matter, the filing of a program access complaint is an onerous undertaking for a competitive MVPD. As explained above, an MVPD must balance the benefits of filing a complaint against the risks associated with making serious allegations against the entities it relies upon for programming. This is not a decision which MVPDs make lightly. Furthermore, damages will not be awarded upon the mere filing of a complaint. Complainants must prove their allegations in order to be awarded damages. These considerations make it highly unlikely that an MVPD would file an unmeritorious claim simply due to the possibility of collecting damages. New entrants seek to make money by providing superior value to subscribers, not by filing frivolous complaints.

VI. INCUMBENTS' ARGUMENTS AGAINST APPLYING THE PROGRAM ACCESS RULES TO TERRESTRIALLY DELIVERED PROGRAMMING UNDERSCORE THE NEED TO CLOSE THIS LOOPHOLE

The incumbent cable industry unanimously objects to the application of the program access rules to terrestrially delivered programming.^{59/} These parties assert that the plain language of Section 628, its legislative history, and policy reasons dictate that the Commission cannot, under its existing authority, extend the reach of the program access rules to programming that is delivered to cable operators via means other than satellite. The intensity and vigor with which these parties oppose the application of Section 628 to terrestrial-delivered programming suggests that this will become a much larger issue which the Commission and/or Congress must address. It is clearly foreseeable that an increasing amount of popular video programming previously

^{58/} See 47 C.F.R. § 73.1003(q).

^{59/} Comments of NCTA at 13-14; Comments of Cablevision at 15-18.

delivered via satellite and thus squarely under the ambit of Section 628 is likely to be switched to terrestrial means of delivery, thereby allowing programmers to deny access to such programming to competitive MVPDs.

The increase in "regional clustering" of MSO ownership of cable systems in major markets is a trend noted by the Commission^{60/} which portends that cable incumbents are likely to increase the frequency with which they evade the program access rules by switching to terrestrial delivery of popular programming. This clustering phenomenon has been particularly pronounced in major markets, including New York, Philadelphia and Chicago. Not surprisingly, these very markets are implicated in the delivery of cable programming by terrestrial means, allowing incumbents to deny competitors access to popular local sports and other programming. This technique of denying access to programming is likely to be repeated throughout the country absent aggressive enforcement of the law by the Commission and/or changes in the law by Congress.

The comments of Cablevision are particularly illustrative of the intentions of cable incumbents to circumvent the intention of Section 628 by switching programming from satellite to terrestrial delivery. While other incumbents make the pretextual argument that terrestrial delivery will lower their costs and is more suitable for the distribution of local programming,^{61/} Cablevision essentially admits that it intends to switch programming to terrestrial delivery to "protect its rights" to programming it has developed or for which it has bought the rights to carry.^{62/} This is a

^{60/} Fourth Annual Report at ¶ 140.

^{61/} *See, e.g.,* Comments of Comcast at 12.

^{62/} *See* Comments of Cablevision at 10 (stating that the changes discussed in the NPRM would "exacerbate the current regulatory distortions" in the cable programming business).

rather forthright assertion that Cablevision intends to evade the intent of Congress by making popular programming unavailable to its competitors. Such evasions of Section 628 by resort to terrestrial delivery should not be countenanced, and the Commission possesses the inherent authority to prevent such circumvention of its rules.

Incumbents claim that the fact that Congress adopted a version of the program access statute that refers specifically to satellite-delivered programming rather than earlier versions of the legislation that applied to all video programming is evidence that these rules do not apply to terrestrial-delivered programming.^{63/} These commenters argue that Congress made a conscious choice specifically to exclude anything other than satellite delivered programming from the reach of Section 628. Unfortunately for these incumbent cable commenters, they do not and cannot refer to any evidence in the legislative history of Section 628 that Congress made a conscious decision to omit terrestrially-delivered programming from the scope of Section 628's coverage. This is because such a conscious decision never occurred. In 1992, virtually all cable programming was delivered by satellite, and the final version of Section 628 simply reflects that reality. Thus, there is no basis for the Commission to conclude that the legislative history of the statute bars it from dealing with clear attempts to evade Section 628 by switching from satellite to terrestrial delivery.

Moreover, even as Congress was formulating the Telecommunications Act of 1996, the vast majority of cable programming was still delivered by satellite. Only in the last year have cable incumbents been switching programming that had been satellite-delivered to terrestrial delivery. Thus, contrary to the claims of several cable incumbents that Congress made another

^{63/} See, e.g., Comments of Comcast at 10.

conscious decision not to expand the reach of Section 628 in the Telecommunications Act of 1996, the reality is that this practice was not commonplace in the industry at the time Congress passed the 1996 Act.

VII. CONCLUSION

The record before the Commission in this proceeding demonstrates the need for the rules changes advocated by Ameritech in its comments in response to the NPRM. These rules changes enjoy the broad support of competitors to the incumbent cable industry and from consumers. The only opposition to the proposed rules changes comes from the incumbent cable industry which is determined to maintain the noncompetitive status quo. Their arguments against the proposed rules changes reflect the problems in the MVPD marketplace and do not point toward solutions. The goals of Section 628 -- greater competition resulting in increased choices and decreased

prices for American consumers -- have not been realized under the Commission's current rules. The targeted proposals urged by Ameritech in this proceeding, supported by other MVPDs and consumer groups, will help to ensure that these goals are fulfilled by accelerating the pace of developing competition in the MVPD marketplace.

Respectfully submitted,



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